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NO. 88-182

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

GENERAL ELECTRIC COMPANY,
Petitioner

v.

JOHN M. GRAVITT, *EX REL.* UNITED STATES,
Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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RESPONDENT JOHN M. GRAVITT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondent John M. Gravitt respectfully requests that this Court deny the Petition for Writ of Certiorari. Respondent contends that no grounds exist for granting a Writ of Certiorari to review this interlocutory appeal for the following reasons:

(1) There is no conflict among the circuits on a significant or recurring question that warrants this Court's consideration;

(2) The decision of the Court of Appeals depends upon the particular facts of this case, *inter alia*, the fact that

adequate discovery was not conducted; Respondent Gravitt, *Qui Tam* Plaintiff in the District Court action, was completely shut out of the negotiations that led to the proposed settlement agreement at issue; Plaintiff Gravitt objected to the terms of the proposed settlement agreement; and the proposed settlement agreement proffered by the General Electric Company ("GE") and the United States was plainly inadequate, especially in light of the False Claims Act Amendments of 1986, and was properly rejected by the District Court.

(3) The Court of Appeals correctly held that the District Court Order refusing to approve the settlement was not appealable because it was not a final Order and was not a "collateral order" appealable under 28 U.S.C. § 1291;

(4) The case currently is pending in the United States Court of Appeals for the Sixth Circuit upon Petition for Writ of Mandamus and in the United States District Court for the Southern District of Ohio on that Court's Trial Docket, and is not, therefore, ripe for consideration by this Court.

(5) Defendant GE has submitted issues to this Court not presented to the District Court and not ruled upon by any court below.

(6) Defendant GE has no standing to raise the question of the constitutionality of the provisions of the False Claims Act providing for judicial review of proposed settlements between the Government and federal contractors.

(7) Congress has the authority to provide a means by which the judiciary can prevent collusion between the Government and federal contractors in False Claims Act cases.

STATEMENT OF THE CASE

In its Petition, Defendant General Electric Company ("GE") mischaracterizes much of what occurred in the proceedings before the District Court and the scope of the investigation performed by the parties prior to the District Court's determination that the proposed settlement was inadequate.

Respondent John M. Gravitt, the *Qui Tam* Plaintiff in this action, was employed by GE for approximately three years in its Cincinnati, Ohio Aircraft Engine Business Group headquarters. During most of his employment, Plaintiff Gravitt was a machinist foreman in Developmental Manufacturing Operations (DMO).

In the course of his duties, Mr. Gravitt learned that labor hours spent on commercial contracts and Government contracts were unlawfully being charged to Government contracts other than those for which the work was actually being performed through alterations to labor vouchers and other means or falsification of labor vouchers. Likewise, idle time was falsely vouchered to Government jobs. Mr. Gravitt was himself instructed to falsify vouchers but refused. When Mr. Gravitt complained to his superiors at GE about the false labor vouchering scheme, his employment was terminated.

Mr. Gravitt thereafter filed this action against Defendant GE on October 26, 1984. The action was brought by Mr. Gravitt on behalf of the United States of America pursuant to the False Claims Act, 31 U.S.C. §§ 3729-3731.[1] In his Complaint, Mr. Gravitt alleged extensive and willful falsification of GE employees' labor vouchers used to calculate charges to the United States pursuant to defense contracts for aircraft engines. Under applicable law as it then existed, the Department of Justice ("DOJ") and the United States Attorney for

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[1] Plaintiff Gravitt brought this action as a *Qui Tam* Plaintiff pursuant to 31 U.S.C. § 3730.

the Southern District of Ohio entered an appearance in December 1984.[2]

From 1984 onward, GE refused to respond to Mr. Gravitt's requests for discovery. Other than limited discovery allowed by the Special Master solely on the question of the reasonableness of the settlement, Mr. Gravitt never was able to obtain requested discovery. Furthermore, contrary to GE's assertions, the DOJ did not engage in any discovery under the Federal Rules of Civil Procedure and the District Court so found. The only investigation ever performed in this case was an abbreviated criminal investigation conducted by the FBI.

After confirming that thousands of GE's employees labor vouchers had been falsified, but without conducting any meaningful discovery, the DOJ and GE determined to settle this action with a $234,000 payment by GE to the Government. (Proposed Settlement attached as Appendix I, Petitioner's Brief, pp. 44a-57a) (hereinafter App. ____, Pet. B. p. ____). This settlement was negotiated in secret and arrived at without involving Mr. Gravitt in any way. GE and the DOJ then filed a Stipulation of Dismissal without advising Mr. Gravitt and without seeking the approval of the Court. (App. J, Pet. B. p. 48a). Such approval is required by 31 U.S.C. § 3730(b)(1).

Mr. Gravitt objected to this plainly inadequate settlement. On January 8, 1986 and after a hearing on the issue, the District Court issued an Order vacating the Stipulation of Dismissal and certifying the issue whether the Trial Court had jurisdiction to approve or disapprove the proposed settlement as appropriate for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (App. E, Pet. B. pp. 32a-34a). All parties filed Petitions for Permission to Appeal on January 21, 1986, which Petitions were denied by the Sixth Circuit Court of Appeals. (App. D, Pet. B. pp. 30a-31a).

The District Court thereafter determined "that it ha[d]

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[2] The DOJ has the right to take over conduct of litigation in a False Claims Act suit under 31 U.S.C. § 3730(b)(2).

jurisdiction to consider the fairness of the proposed settlement and to conduct an inquiry therein." The District Court designated United States Magistrate Robert Steinberg as a Special Master pursuant to Fed. R. Civ. P. 53, and directed him to conduct an inquiry, which was to include evidentiary hearings, and thereafter issue a Report and Recommendation on the adequacy of proposed settlement. (App. F, Pet. B. pp. 35a-36a). The District Court also granted Mr. Gravitt's Motion to Intervene pursuant to Fed. R. Civ. P. 24. (App. G, Pet. B. p. 37a).

On October 27, 1986 President Reagan signed into law the False Claims Amendments Act of 1986. Pub. L. No. 99-562, § 2, 100 Stat. 3153 (codified as amended at 31 U.S.C. §§ 3729-3733) (1986). These Amendments were passed in part due to the efforts of Mr. Gravitt and in response to GE's and the DOJ's handling of this False Claims Act case.

Meanwhile, contrary to GE's assertions, the Special Master did not conduct an "exhaustive" inquiry into the merits of the proposed settlement. He did not hold an evidentiary hearing as directed by the District Court Judge and by Fed. R. Civ. P. 53(e), nor did he allow Mr. Gravitt to conduct any meaningful discovery on the merits of the settlement proposal or the underlying dispute. Nevertheless, he issued a Report and Recommendation that the settlement entered into between the DOJ and GE be approved. (App. C, Pet. B. pp. 9a-29a). Mr. Gravitt filed a timely Objection to the Report, arguing, *inter alia*, that the Special Master erred by not allowing him to conduct adequate discovery, by not holding an evidentiary hearing, and by failing to apply the 1986 Amendments to the False Claims Act in evaluating the settlement.[3]

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[3] Included in the 1986 Amendments was a provision specifically setting forth the burden of proof. Under the statute as amended, a False Claims Act plaintiff is required to prove the essential elements of the cause of action, including damages, "by a preponderance of the evidence." 31 U.S.C. § 3731. Prior to this Amendment, the statute did not set forth a particular burden of proof, but some courts construing the statute had found that a False Claims

After extensive briefing by all the parties and a two day hearing which included testimony from the FBI agent in charge of the criminal investigation, the District Court Judge issued an Order rejecting the Special Master's Report and Recommendation and returned the case to the Trial Docket. (Attached hereto as App. I, pp. 1a-5a). In his Order, the District Court Judge ruled that the 1986 Amendments to the False Claims Act should be applied to a pending case such as this one.[4] The Court found, therefore, that the settlement must be evaluated with a view towards the Government's ability to prove the allegations by a preponderance of the evidence, a standard different from that relied upon by the Special Master, as well as by the Government investigators in this case. (App. I, p. 3a).

In reaching his conclusion, the District Court Judge specifically found that adequate discovery *had not been* conducted. The Court stated:

> The conduct of the Department of Justice in this matter bears some inquiry. . . . For reasons that have never been made clear, the Department of Justice rather than welcome the assistance of Plaintiff and his counsel, took every step possible to frustrate their participation. The Department of Justice took no deposition, interviewed no witness and instead confined its efforts to opposing all attempts by Plaintiff's counsel to conduct appropriate discovery.

Act claim had to be proven by showing "specific intent to defraud" the United States by "clear, unequivocal, evidence." *See e.g., United States* v. *Ekelman & Associates, Inc.*, 532 F.2d 545, 548 (6th Cir. 1976); *United States* v. *Ueber*, 299 F.2d 310, 314-315 (6th Cir. 1962). The 1986 Amendments also increased the damages and penalties payable to the Government and assured *qui tam* plaintiffs a greater role in litigation. 31 U.S.C. §§ 3729-3731.

[4] Other courts have ruled that the 1986 Amendments should be applied retroactively. *See e.g. United States* v. *Hill*, 676 F.Supp. 1158, 1172 (N.D. Fla. 1987). Further, the sponsors of the Amendments clearly stated their intention that they be applied retroactively. 133 Cong. Rec. H9515-9516 (1987).

(*Id.* at 4a). The Court concluded "from the totality of the proceeding thus far," that the proposed settlement was "inadequate." (*Id.* at 5a).

Defendant GE and the DOJ filed interlocutory appeals to the Court of Appeals for the Sixth Circuit from this preliminary Order of the District Court, asserting that the Court had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1). Mr. Gravitt filed a Motion to Dismiss the appeals for the reason that the District Court Order rejecting the proposed settlement was not a final Order and the Court of Appeals, therefore, had no jurisdiction. The Court of Appeals agreed with Plaintiff Gravitt's position and on May 3, 1988 issued an Order granting his Motion to Dismiss. (App. A, Pet. B. pp. 1a-2a).[5]

Thereafter, on May 12, 1988 the DOJ filed a Motion for Extension of Time within which to file a Petition for Rehearing with Suggestion for Rehearing En Banc, asserting it could not prepare its Petition within the fourteen day time period provided by Fed. R. App. P. 40. On May 16, 1988 GE filed a similar Motion for Extension of Time, for the sole reason that the DOJ had requested an extension. GE's Motion was filed *one day* before its Petition for Rehearing was due to be filed in the Court of Appeals.[6] On May 31, 1988 the Court of Appeals denied the Motions for Extension of Time. (App. I, p. 6a). Neither GE nor the DOJ filed a Petition for Rehearing within the time permitted by Appellate Rule 40, thus waiving their right to make such a request.

Later, almost two months after the Sixth Circuit denied GE's and the DOJ's Motions for Extension of Time to Petition

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[5] Neither GE nor the DOJ, however, ever sought a stay of the District Court's Order returning the case to the Trial Docket, and no stay ever has been granted. This case currently is pending in the United States District Court where discovery is now finally being conducted, and trial is set for February 27, 1989.

[6] The parties had fourteen days, up to and including May 17, 1988 to file petitions for rehearing. Fed. R. App. P. 40.

the Court for Rehearing, on July 27, 1988, GE filed a Petition in the Sixth Circuit Court of Appeals for a Writ of Mandamus or Other Appropriate Relief to the United States District Court for the Southern District of Ohio. In the Petition, GE requested that the Sixth Circuit Order the District Court Judge to vacate his Order rejecting the Report and Recommendation of the Magistrate and order him to approve the settlement between GE and the DOJ. GE's Petition for a Writ of Mandamus is currently pending before the United States Court of Appeals for the Sixth Circuit.

GE's Petition for Writ of Certiorari was filed August 3, 1988, seeking the same basic relief it is seeking in its Petition for Writ of Mandamus pending in the Court of Appeals. In both proceedings, GE is attempting to have the District Court's Order rejecting the settlement set aside, the settlement approved, and the case dismissed.[7]

I. THIS CASE PRESENTS NO SIGNIFICANT OR IMPORTANT RECURRING ISSUE OF THE APPEALABILITY UNDER 28 U.S.C. § 1291 OF DISTRICT COURT ORDERS REFUSING TO APPROVE SETTLEMENTS

This case presents an unusual non-recurring situation, rendering it inappropriate for appellate review under 28 U.S.C. § 1291. Simply, two of the three parties to the action attempted to settle the lawsuit over the objections of a third party. Defendant GE and the DOJ entered into the proposed settlement agreement without conducting any discovery under the Rules of Civil Procedure, without the participation of the person who initiated the lawsuit, and without the approval required by law of the District Court Judge. Under

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[7] The DOJ has neither filed a Petition for Writ of Mandamus nor a Petition for Writ of Certiorari.

these circumstances, the District Court Judge properly referred the matter to a Special Master for the purpose of determining the facts and assessing whether the proposed settlement was fair and reasonable. The Special Master, however, did not hold any evidentiary hearings and issued a Report and Recommendation that the District Court Judge approve the settlement without hearing any sworn testimony or even argument from counsel. In the meantime, the 1986 Amendments to the False Claims Act were passed, lessening the burden of proof, increasing penalties, and further defining the substantial rights of *qui tam* plaintiffs, such as Mr. Gravitt.

In his consideration of Mr. Gravitt's Objections to the Report and Recommendation of the Special Master, the Distric Court Judge reviewed the conduct of the parties in this case. The Judge could not have been more clear in his comments that he was deeply troubled by the actions of the DOJ which had done everything in its power to exclude Mr. Gravitt from the case and which had attempted to settle the case without conducting even the most basic discovery. Under these unusual factual circumstances, the District Court Judge properly exercised his discretion to reject the Report and Recommendation of the Special Master, to set aside the settlement, and to schedule this matter for trial.

The facts and circumstances of this case are extremely unlikely to be replicated. Further, this case presents an occasion in which interlocutory appellate review is *not* likely to lead to a different result as it is unlikely that the Court of Appeals would find that the Trial Court Judge abused his discretion in refusing to approve the settlement under these facts and circumstances. Furthermore, this is not a case in which the District Court's decision renders further settlement of this case impossible or improbable. The parties will continue to have the opportunity to discuss settlement and to arrive at a reasonable settlement after proper discovery has been conducted and the impact of the 1986 Amendments to the False Claims Act has been considered.

II. THIS CASE PRESENTS NO CURRENT CONFLICT AMONG THE CIRCUITS CONCERNING APPELLATE JURISDICTION UNDER 28 U.S.C. § 1291

GE erroneously states that this case provides the proper vehicle for resolving a question regarding appealability of orders rejecting a settlement, which this Court reserved in *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981). At the time of *Carson* there existed a conflict in the circuits on the question whether a court's refusal to accept a settlement is appealable under 28 U.S.C. § 1291. Specifically, the Ninth Circuit had found that such an order was appealable under § 1291. *Norman* v. *McKee*, 431 F.2d 769 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971). Conversely, the Second Circuit had ruled that such an order was not appealable under § 1291. *Seigal* v. *Merrick*, 590 F.2d 35 (2d Cir. 1978).

Subsequent to this Court's decision in *Carson*, however, the Ninth Circuit expressly repudiated its decision in *Norman* v. *McKee* and found that a District Court Order refusing to approve a settlement is *not* appealable under 28 U.S.C. § 1291. *E.E.O.C.* v. *Pan American World Airways*, 796 F.2d 314, 318, n. 7 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 874 (1987). Thus, the conflict in the circuits that this Court recognized in *Carson* no longer exists and the reason stated in *Carson* for this Court's possible future consideration of this issue no longer holds true.

Further, GE does not allege and could not show that there is any conflict in the Circuits concerning the question whether a District Court's Order refusing to approve a False Claims Act settlement is immediately appealable pursuant to 28 U.S.C. § 1291. It appears that the United States Court of Appeals for the Sixth Circuit, in this case, is the only federal appellate court to specifically address this question.

III. THIS CASE DOES NOT PROPERLY RAISE ANY SIGNIFICANT QUESTIONS OF PUBLIC IMPORTANCE THAT MANDATE REVIEW BY THIS COURT

GE argues that this Court should grant its Petition for Writ of Certiorari to resolve the allegedly important question whether the District Court Judge's Order unconstitutionally infringes upon the Government's prosecutorial discretion. GE has not raised any important question that requires this Court's review.

A. This Court Should Not Consider An Issue Not Raised In The First Instance In The District Court

GE argues at length that immediate appellate review of the District Court's Order is necessary to "avoid irremedial interference with the Government's prosecutorial discretion." GE asserts that the decision of the Trial Court Judge presents "serious questions of constitutional dimension concerning the proper scope of judicial and executive discretion" and suggests that the Trial Court's actions are unconstitutional and unlawful. None of these arguments or issues were raised in the District Court or ruled upon by the Court of Appeals. They should not, therefore, be considered in the first instance by this Court.

The question before this Court is whether *this* Order of the District Court Judge is sufficiently collateral to render it immediately appealable under § 1291 as an exception to the final judgment rule. GE's challenge to the District Court's Order on constitutional grounds is a thinly disguised challenge to the constitutionality of the False Claims Act which provides for judicial review of proposed settlements between the United States and federal contractors accused of defrauding the Government. Neither GE nor the DOJ alleged in the District Court proceedings that the False Claims Act was unconstitutional and they should not be heard to do so

now. *Delta Airlines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970).

B. Defendant GE Has No Standing To Raise The Question Whether The Court's Order Unconstitutionally Infringes Upon The Government's Prosecutorial Discretion

Defendant GE's argument that the District Court Judge's Order refusing to approve this False Claims Act settlement unconstitutionally infringes upon the Government's prosecutorial discretion is an argument that concerns the interests of the United States only. Admittedly, in this instance GE could be a beneficiary of a legal ruling that the District Court Judge does not have the power to disapprove the settlement, but this question does not involve any right that belongs to GE. Review of a collateral order is available to a party only if it "affect[s] *rights* that will be irretrievably lost in the absence of an immediate appeal." *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 430-431 (1985).

Simply put, GE has no standing to advance or argue this issue. This Court has consistently held that a litigant, even though properly before the Court, may not assert the rights of third parties in support of his position. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 166 (1972). This policy prevents, in most instances, unnecessary consideration of constitutional issues. *Singleton* v. *Wulff*, 428 U.S. 106, 113-114 (1976). Although exceptions to this rule exist, they apply primarily in cases in which a party is not capable of asserting or protecting his own rights. *See e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 508-510 (1975); *Barrows* v. *Jackson*, 346 U.S. 249, 255-257 (1953).

The United States of America is a full party to this action, having intervened in the case pursuant to 31 U.S.C. § 3737(b)(2). Although dozens of pleadings have been filed in this action, at no time has the DOJ ever raised the issue that

the District Court's Order refusing to approve the settlement entered into between the DOJ and GE is an unconstitutional infringement on the DOJ's prosecutorial discretion. Furthermore, the DOJ chose not to seek a Petition for Writ of Certiorari or to join in GE's Petition.

C. Congress Has The Authority Under The Constitution To Provide The Means By Which The Court Can Prevent Collusion Between The Government And Federal Contractors In The Settlement Of False Claims Act Cases

The District Court's Order is neither unlawful nor unconstitutional. The False Claims Act has long provided that actions may not be dismissed without written approval of the Court. 31 U.S.C. § 3730(b)(1). To alleviate any question concerning the District Judge's authority to oversee False Claims Act cases, the drafters of the 1986 Amendments clarified the Court's power to assure that the Government and defense contractors do not enter into "sweetheart settlements." The Act is crystal clear that the Government may not settle a False Claims Act suit without a hearing and without a determination from the District Court Judge that the settlement is "fair, adequate and reasonable under all the circumstances." 31 U.S.C. § 3730(c)(2)(B) (1986 Amendments).

The drafters of the 1986 Amendments were concerned, as was the District Court Judge in this case, that the DOJ was not doing an adequate job of prosecuting defense contractor fraud. *See* comments of Representative Berman of California, 132 Cong. Rec. H6482 (1986). Similar concerns were expressed by Representative Bedell of Iowa, who noted that the Government often will not prosecute defense contractor fraud for political reasons. *Id.* at H6483. Under these circumstances Representative Berman stated that "the *Qui Tam* provisions of the bill are a critically needed supplement." *Id.* at H6482.

Congress clearly has the right to provide for judicial oversight of the DOJ's actions in the prosecution or settlement of

False Claims Act cases. Similar oversight functions are found in the Ethics in Government Act, 28 U.S.C. § 49, 591-598, which provides for District Court review of the Attorney General's refusal to investigate alleged misconduct of Government officials. *Nathan* v. *Attorney General of the United States*, 557 F.Supp. 1186, 1189 (D.D.C. 1983), *rev'd on other grounds*, 737 F.2d 1069 (D.C. Cir. 1984).

The cases cited by GE do not lend credible support to its argument that the judicial oversight provided for in the False Claims Act is unconstitutional. *Heckler* v. *Chaney*, 470 U.S. 821 (1985), concerns the extent to which the decision of an administrative agency to exercise its discretion not to undertake enforcement is subject to judicial review under the Administrative Procedures Act. It does not in any way concern itself with the question whether Congress could have constitutionally provided for judicial oversight in the Administrative Procedures Act.

Similarly, *United States* v. *Dupris*, 664 F.2d 169 (8th Cir. 1981) also is inapposite. The Court in *Dupris* found that the order appealed from had forced the Government to go to trial. In this case the DOJ need not try the case. Mr. Gravitt would be more than happy to prosecute this case on the Government's behalf.

Finally, in *United States* v. *Hamm*, 659 F.2d 624, 629 (5th Cir. 1981), the Court recognized the power of the judiciary to monitor the actions of a prosecutor where his actions are "tainted with impropriety." Mr. Gravitt has alleged from the time this proposed settlement first was announced that the actions of both GE and the DOJ were improper.

GE's position that the DOJ has unfettered discretion to collude with defense contractors and enter into sweetheart settlements and that no judge can act to prevent it, is typical of the arrogance displayed by Defendant GE throughout this litigation. Defense contractor fraud is rampant in this country and Congress has rightly decided that even if the DOJ will not do anything about it, it will give the tools to private

citizens and the Court to assure that action is taken to protect the American taxpayers.[8] In this case the District Court Judge has done nothing unlawful, but has merely attempted to protect the interests of the American public in a situation in which the DOJ has failed to do so. Chief Judge Rubin should be applauded, not criticized, for his courageous stand. The arguments, raised by Defendant GE so late in the day, do not provide any basis for this Court to accept jurisdiction.

IV. THE ORDER OF THE DISTRICT COURT REJECTING THE PROPOSED SETTLEMENT AND STIPULATION OF DISMISSAL IS NOT A FINAL COLLATERAL ORDER

The Court of Appeals correctly determined that the District Court's Order was not a collateral order appealable under 28 U.S.C. § 1291. The collateral order doctrine is a narrow exception whose reach is limited to a small class of prejudgment orders, affecting rights that will be irretrievably lost in the absence of an immediate appeal. *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 430-431 (1985); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). To qualify as a collateral order, a decision must:

> [C]onclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

Coopers & Lybrand v. *Livesay*, 437 U.S. 463, 468 (1978). A party seeking appeal must show that all three requirements

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[8] Although no one knows how much public money has been lost to fraudulent defense contractors, estimates from the General Accounting Office, DOJ, and Inspectors General range from hundreds of millions of dollars to more than $50 billion *per year*. Legislative History of False Claims Amendments Act of 1986, 132 Cong. Rec. S5267 (1986).

are satisfied. *Stringfellow* v. *Concerned Neighbors In Action*, 107 S.Ct. 1177, 1182 (1987). The Order at issue meets none of these requirements.

GE's reliance upon *Carson* v. *American Brands* is entirely misplaced. *Carson* involves a distinct factual situation[9] and addresses only the question whether the interlocutory order at issue therein was immediately appealable under 28 U.S.C. § 1292(a)(1) as an order refusing an injunction. 450 U.S. at 83-84. In reaching its decision, *Carson* applied a completely different standard than must be applied in determining whether the Order at issue herein is within that "small class" of cases so as to be appealable under § 1291.[10]

A. The District Court's Order Does Not Conclusively Determine The Disputed Question

The District Court Judge determined only that he would not approve *this* settlement at *this* juncture of the case. No one knows what the District Court Judge might do if presented with a settlement proposal after the parties have had an opportunity to conduct meaningful discovery and after the impact of the 1986 Amendments to the False Claims

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[9] In *Carson*, all parties wished to settle the case and were prevented from doing so by the Court. 450 U.S. at 81-82. Conversely, Mr. Gravitt, a full party to this action, objected to the proposed settlement. Furthermore, *Carson* involved litigation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, a significant factor in this Court's determination that the Order refusing to approve the proposed settlement was immediately appealable under 28 U.S.C. § 1292. *Carson*, 450 U.S. at 88, n. 14; *Local No. 93* v. *City of Cleveland*, 106 S.Ct. 3063, 3073 (1986). As this Court explained in *Local 93*, it found the Order in *Carson* appealable because of Congress' strong preference for encouraging voluntary settlements of Title VII litigation. *Id.*

[10] Further, GE's argument that this appeal should be allowed under § 1291 because the *Carson* Court found that the Order therein was appealable under § 1292 is specious. Congress expressly provided in § 1292 that orders refusing injunctions be immediately appealable. No such express authority exists to support GE's argument that all other orders refusing settlements should be immediately appealable under § 1291.

Act has been considered fully. Where the parties are free to return to the bargaining table, an order initially refusing to approve a settlement does not conclusively determine the question whether a settlement can be reached. *Pan American*, 796 F.2d at 317; *State of New York* v. *Dairylea Co-Op, Inc.*, 698 F.2d 567, 570 (2d Cir. 1983); *Seigal* v. *Merrick*, 590 F.2d 35, 37 (2d Cir. 1978).

This case presents an entirely different situation than *Carson*. The *Carson* court indicated that the Order at issue therein conclusively determined the disputed question only because the District Court judge indicated he would not approve *any* settlement containing the injunctive relief requested by the parties. *Carson*, 450 U.S. at 87, n.12. *Carson* does not support GE's argument that all orders refusing to approve all settlement agreements conclusively determine the question whether a settlemet can be reached. This same argument was considered and rejected by the Second Circuit Court of Appeals in *Dairylea*, in which the Court recognized that:

> [A] literal reading of *Carson*'s suggestion that the mere inability to settle could establish irreparable harm would permit appeal from every denial of a proposed settlement. That result was clearly not contemplated by the *Carson* court.

Dairylea, 698 F.2d at 570.

This Court has made clear that the collateral order exception to the final judgment rule does not apply to orders such as the one at issue herein that are "inherently tentative." *Gulfstream Aerospace Corp.* v. *Mayacamus Corp.*, 108 S.Ct. 1133, 1137 (1988).[11] In a concurring opinion Justice Scalia cautioned that the Court's finality jurisprudence "is sorely in need of further limiting principles" and suggested that for a non-final order to be appealable under § 1291, it "must in-

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[11] In *Gulfstream*, the Supreme Court found that an order of the District Court refusing to stay litigation was inherently tentative and, therefore, not appealable under 28 U.S.C. § 1291.

volve 'an important and unsettled question of controlling law, not merely a question of the proper exercise of the trial court's discretion.' " *Id.* at 1145, *citing Boreri* v. *Fiat, S.P.A.*, 763 F.2d 17, 21 (1st Cir. 1985). This approach also is favored by the Second Circuit Court of Appeals, as set forth in *Seigal*:

> [T]he gist of the *Cohen* doctrine 'revolve[s] about issues concerning the *power* of the District Court to render its decision, as distinct from the propriety of its exercise of discretion.'

590 F.2d at 37 (citation omitted) (emphasis in original).

Similarly, the Order of the District Court herein is merely an exercise of the Court's discretion to refuse to approve a settlement improvidently entered into before a proper evaluation of the merits of the case could be made. As such, it is not the final word on the issue and does not satisfy the first prong of the collateral order test.

Further, the alleged unconstitutionality of the District Judge's Order refusing to approve the inadequate settlement of this False Claims Act case does not render this case immediately appealable under 28 U.S.C. § 1291, nor does it mandate this Court's review. Chief Justice Rehnquist rejected a similar argument in *Deaver* v. *United States*, 108 S.Ct. ____, 97 L.Ed. 2d 784 (1987), in which he found that the petitioner's challenge to the constitutionality of the Ethics in Government Act was not sufficiently collateral to fall within the "limited exception" to the final judgment rule. Chief Justice Rehnquist recognized that if orders denying challenges to a statute's constitutionality were immediately appealable, the policy against piecemeal appeals "would be swallowed by ever-multiplying exceptions." 97 L.Ed. 2d at 786, *citing United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 270 (1982).[12] Although both *Deaver* and *Hollywood Motor Car*

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[12] Petitioner Deaver was then requesting a stay of prosecution pending the outcome of his Petition for a Writ of Certiorari. The Court later denied Certiorari. *Deaver* v. *United States*, 108 S.Ct. 99 (1987).

concern challenges to the constitutionality of criminal statutes the same analysis applies. The question of a statute's constitutionality or the constitutionality of an order pursuant to a statute is not sufficiently collateral to justify appeal of an interlocutory order under 28 U.S.C. § 1291.

Petitioner erroneously relies upon *Donovan* v. *Occupational Safety and Health Review Commission*, 713 F.2d 918 (2d Cir. 1983), to support its contention that the Order of the District Court Judge is a collateral order subject to immediate appeal. *Donovan* v. *Occupational Safety & Health Review Commission* specifically concerned a dispute between the Secretary of Labor and the Occupational Safety & Health Review Commission over the question whether the Secretary has discretionary authority to enter into settlement agreements under the Occupational Safety and Health Act (OSHA) or whether his decisions are subject to review of the Commission.[13] Neither this case nor the other similar cases cited by GE address the question presented in this Petition, whether *judicial* orders overruling a decision of the Secretary are collateral and subject to immediate appellate review.[14]

The Court's ruling that the order of the Commission preventing the Secretary from entering into a settlement agreement was appealable as a collateral order turned on the

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[13] The Occupational Safety and Health Review Commission is a branch of the Department of Labor. The Occupational Safety and Health Review Commission, however, has adjudicatory authority under OSHA. *Donovan* v. *Occupational Safety and Health Review Commission*, 713 F.2d at 920.

[14] Contrary to GE's assertion, *Donovan* v. *Occupational Safety and Health Review Commission* does not repudiate *Seigal* v. *Merrick* in cases in which the United States is a party. Rather, the Court states clearly that if the Commission in that case had *disapproved* the settlement, on remand, "the Secretary would be faced with the difficult task of demonstrating that the interlocutory order falls within the collateral order exception." 713 F.2d 924, n. 10, *citing Seigal* v. *Merrick*. This is precisely the posture of this case and *Seigal* remains clear authority for Mr. Gravitt's position that the Order disapproving the settlement is not a collateral order subject to immediate appeal.

specific language of OSHA which gives the Secretary of Labor unfettered discretion to prosecute violations of the Act.[15] Furthermore, the Court was greatly concerned that the impasse between the Secretary and the Commission had allowed serious OSHA violations to go unabated. For these specific reasons, the Court found the Commission's order to be an appealable collateral order. *Id.* at 924.

Conversely, under the False Claims Act, the Government's discretion is limited by the participation of the *qui tam* plaintiff and by the Act's express provision that an action may not be settled or dismissed without the court's written consent. 31 U.S.C. § 3730(b)(1). This fact alone renders the instant case wholly distinguishable from cases involving disputes over the various agencies' powers under OSHA.

B. The Question Whether The Settlement Should Be Approved Is Not Completely Separate From The Merits Of The Action

The question whether the settlement is fair and reasonable and should be approved by the District Court is inextricably enmeshed with the factual and legal issues of the case, precluding immediate appeal under § 1291. *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 377 (1981). This is especially true in this instance where the Court determined that the DOJ had not conducted adequate discovery and had thwarted Plaintiff's efforts to conduct his own discovery.

Again, GE's reliance on *Carson* is misplaced. Nowhere in *Carson* does this Court state that an order of the District Court disapproving a settlement is collateral to the merits so as to give rise to jurisdiction under § 1291. Although the *Carson* Court did state in *dicta* that in passing on the settlement, the district court judge does not decide the merits of the case, it also stated that a court must judge the fairness of a pro-

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[15] Only the Secretary of Labor may prosecute OSHA violations; there is no private cause of action. 713 F.2d at 927.

posed settlement "by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement." 450 U.S. at 88, n. 14. Likewise, the Second Circuit found that an order disapproving a settlement necessarily is based, in part, on an assessment of the parties' positions. *Seigal*, 590 F.2d at 37. This analysis entails some evaluation of the facts and the law as it should be applied to those facts. An order of the district court judge disapproving a settlement cannot, therefore, be said to be wholly separate from the merits of the case so as to fall within the small class of cases that are appealable under § 1291.

Under GE's analysis of *Carson*, any order of a district court disapproving a settlement would be immediately appealable. That is clearly not the intent of 28 U.S.C. § 1291, nor of the Supreme Court and appellate court decisions cited herein that have narrowly applied the collateral order exception to a limited number of cases and under rare circumstances. Application of the principle advanced by GE would further expand the collateral order exception, in direct contravention to the need for limitation suggested by Justice Scalia in *Mayacamus*, 108 S.Ct. at 1145. Other than the now repudiated decision of the Ninth Circuit in *Norman* v. *McKee*, no court has ruled as GE urges, that orders refusing to approve settlements are collateral to the issues before the Court.

C. The District Court's Ruling Is Reviewable On Appeal From A Final Judgment

Contrary to GE's assertion, it could obtain review of the District Court's Order on appeal after a final judgment. If GE is found at trial to be liable to the Government for more than the proposed settlement, the Court of Appeals could examine the record and determine whether the District Court Judge erred by rejecting the proposed settlement at the preliminary stage. This would be no different than the situation that exists when an appellate court orders that the district court should have granted summary judgment in a

party's favor, thus relieving that party of any liability that may have been established at trial.

V. THE DECISION OF THE COURT OF APPEALS DOES NOT UNDERMINE THE ABILITY OF LITIGANTS TO FAIRLY SETTLE CASES WITHOUT TRIAL

GE unfairly raises the specter that litigants will not be able to settle cases prior to trial without a determination by this Court that all orders refusing settlements are collateral orders that may be immediately appealed. Nothing could be further from the truth. The unusual circumstances of this case concern a situation in which two of the parties to the action are attempting to settle a case over the objections of a third party without conducting any discovery, without evaluating the case under the proper legal standard, and where court approval is necessary. There is nothing in the Appellate Court's decision, or the decision of the Trial Court Judge, that would undermine the ability of all parties to this action to reach a fair and reasonable settlement of a dispute.

Furthermore, GE is attempting to obtain a ruling from this Court that *all* orders refusing to approve settlements are collateral orders subject to immediate appeal under 28 U.S.C. § 1291. This argument is erroneous for a number of reasons. First, if Congress had intended all orders refusing settlements to be immediately appealable, it could have provided for immediate appeal in the same manner in which it provided for immediate appeal of orders refusing injunctions under § 1292. Second, such an order would be contrary to the numerous decisions of this Court that an order is appealable under § 1291 only in a limited and rare set of circumstances and only if it meets all of the requirements set forth in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978). An order such as the one sought by GE would unnecessarily reach far beyond the facts and circumstances of this case and establish a rule of law that would likely not be appropriate in

all cases. Finally, the broad rule of law sought by GE is unnecessary because in many instances, appeal of an order refusing to approve a settlement will be immediately available under 28 U.S.C. § 1292.

VI. REVIEW IS IMPROPER BECAUSE THIS CASE STILL IS PENDING IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND IT IS NOT A CASE OF IMPERATIVE PUBLIC IMPORTANCE

Just prior to filing this Petition for Writ of Certiorari, GE filed a Petition for Writ of Mandamus to the United States District Court for the Southern District of Ohio. In said Petition, GE requested that the Sixth Circuit Court of Appeals order the District Court Judge to approve the settlement and dismiss the case. If the Sixth Circuit grants the Petition for Writ of Mandamus, GE will have obtained all of the relief it seeks in this Petition for Writ of Certiorari.

This case, which involves only the question whether two of three parties to an action may enter into a settlement agreement the District Court Judge has found to be inadequate, does not rise to the level of imperative public importance this Court has found to exist in the few cases it has accepted for decision despite the fact they were still pending in other courts. Sup. Ct. R. 18. *C.f. Youngstown Sheet & Tube Company* v. *Sawyer*, 343 U.S. 579 (1952) (seizure of the Nation's steel mills during the Korean war); *United States* v. *United Mine Workers*, 330 U.S. 258 (1947) (seizure of the Nation's coal mines by President Truman); *Ex Parte Quirin*, 317 U.S. 1 (1942) (apprehension of German agents illegally inside the United States during World War II). This Court, therefore, should not exercise jurisdiction over this case.

VII. CONCLUSION

The United States Court of Appeals for the Sixth Circuit has properly ordered, in this unique case, that the Order of the District Court Judge disapproving the settlement and returning the case to the trial docket is a collateral order not subject to review under 28 U.S.C. § 1291. Petitioner GE has failed to present any reasonable basis for this Court to disturb the opinion of the Court of Appeals. Respondent Gravitt respectfully requests that this Court deny GE's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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September 2, 1988

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-1-84-1610*

JOHN MICHAEL GRAVITT,

Plaintiff,

v.

GENERAL ELECTRIC CO.,

Defendant.

ORDER
(Filed January 22, 1988)

This matter is before the Court under the following circumstances. John Gravitt, relator herein, brought action against the General Electric Company asserting that there had been substantial overcharges against the United States. On December 13, 1985 the United States represented by the Department of Justice and the General Electric Company entered into a tentative settlement of all claims. This matter was referred to the United States Magistrate (Doc. 31) with instructions to inquire into such settlement. On August 24, 1987 the United States Magistrate filed a Report and Recommendation (Doc. 88) recommending that the Court approve such settlement. On December 18 and 21, 1987 this Court held a hearing at which time evidence and testimony was presented and counsel argued their respective positions for approximately three and one-half hours.

This case turns upon 31 U.S.C. § 3729. A critical and

* Order reported at 680 F.Supp 1162 (S.D. Ohio 1988).

perhaps controlling question to be answered is the retroactive effect of amendments to that section signed into law on October 27, 1986. The amended statute provides in part: "Any person who knowingly presents or causes to be presented to an officer . . . of the United States government . . . a false or fraudulent claim for payment or approval . . . is liable to the United States government for a civil penalty of not less than Five Thousand Dollars and not more than Ten Thousand Dollars plus three times the amount of damages which the government sustains because of the act of that person . . . ." On the same date there likewise became effective an amendment to 31 U.S.C. § 3731 which provides in part as follows: "In any action brought under § 3730 the United States shall be required to prove all essential elements of the cause of action including damages by a preponderance of the evidence. . . ."

Section 3731 prior to amendment did not speak to the level of proof. However, the United States Court of Appeals for the Sixth Circuit in construing the False Claims Acts required that allegations in a civil action be proven by showing "specific intent to defraud" the United States by "clear, unequivocal, evidence." *United States* v. *Ekelman & Associates, Inc.*, 532 F.2d 545, 548 (6th Cir. 1976); *United States* v. *Ueber*, 299 F.2d 310, 314-15 (6th Cir. 1962).

While federal appellate courts are yet to address the issue of retroactive application of the 1986 amendments to the False Claims Act, other federal district courts have reached differing conclusions on the issue. *See United States ex rel. Boisvert* v. *FMC Corporation*, No. 86020163 (N.D. Cal. September 9, 1987) (holding that the 1986 amendments may not be applied retroactively to cut off a defense which existed under the old law); *United States* v. *Bekhrad*, 672 F. Supp. 1529 (S.D. Iowa 1987) (strictly construing statute to apply prospectively only); *United States* v. *Hill*, MCA No. 84-2144-RV (N.D. Fla. November 12, 1987) (holding that retroactive application of amendments will not result in manifest injustice). In a well-reasoned opinion in *Hill*, Judge Vinson applied the well-settled principle of statutory construction enunciated by the

Supreme Court in *Bradley* v. *School Board*, 416 U.S. 696, 711 (1974) "that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in a manifest injustice or there is statutory or legislative history to the contrary." After careful consideration of the facts in the present case, the Court finds that retroactive application of the 1986 amendments to the False Claims Act does not result in a manifest injustice. Moreover, the Court agrees with Judge Vinson that concern for the public well-being militates toward the immediate application of the amendments.[1]

It was established at the hearing that the Department of Justice of the United States directed the FBI to conduct an inquiry. Special Agent John Ryan of the Cincinnati Office was assigned to this task and did conduct such an inquiry. Agent Ryan conducted a criminal investigation and concluded that based upon the evidentiary standard of "proof beyond a reasonable doubt" a criminal prosecution could not be sustained. It may be asserted that since Agent Ryan was an accountant by training that his conclusion regarding financial fraud also embraced a "clear and convincing" test of fraud. Agent Ryan was not concerned with a preponderance of evidence inquiry and insofar as the record indicates did not use that standard. The Court has no reason to question the conclusion of the FBI that there is insufficient evidence for a criminal prosecution.

In view of the extensive investigation made by the FBI and in view of the equally extensive inquiry by the United States Magistrate the Court believes that if a clear and convincing test were to be used, the settlement should be approved.

However, because this Court holds that the 1986 amendments apply retroactively to this matter, the settlement must be tested with a view toward the Government's ability to prove allegations by a preponderance of the evidence, with no requirement to show specific intent to defraud.

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[1] It is interesting to note that in *Hill*, the Government took the position that the amendments should be retroactively applied, contrary to its position in the present case.

It is beyond doubt that there have been instances of massive fraud perpetrated by manufacturers upon the United States and in some instances either aided or overlooked by the various procuring agencies. Terms such as "a $500.00 hammer" or a "$6,000.00 coffee maker" have been used as a form of shorthand to indicate how vast the overcharges have been. This is not to determine that there was in fact fraudulent conduct in this case, but simply to indicate that matters of this sort should be approached with somewhat more caution than they might have been approached fifteen years ago.

The conduct of the Department of Justice in this matter bears some inquiry. There isn't a Judge in the United States who has not at some time been confronted with a litigant, usually *pro se*, who describes a conspiracy so vast as to include the entire governing structure of the United States. Great expenditures of time, energy and money are frequently required to demonstrate that the assertion is either out of ignorance, a spirit of revenge by a disgruntled former employee, or the product of paranoia. It is entirely possible that the Department of Justice approached this case in the first instance with the same view in mind. That initial view is excusable. The subsequent conduct of the Department of Justice is not. It must have developed early on that Mr. Gravitt does not fit the customary pattern of the conspiracy alleging litigant and even more important his counsel is a highly respected and exceedingly competent member of the bar of this Court. Regrettably, the legal profession has its share of "scavengers" — those attorneys who lurk on the edge of propriety and who will commence meritless litigation solely for the purpose of extracting a nuisance value settlement. Such acts approach extortion and contribute to the general public disdain for our profession. Plaintiff's counsel, however, is demonstrably a very competent, skilled and effective lawyer. That if nothing else should have convinced the Department of Justice that here was an ally to be encouraged, who was willing to relieve the Department of Justice of the expenditure of manpower and money in conducting appropriate discovery. For reasons that never have been made

clear, the Department of Justice rather than welcome the assistance of plaintiff and his counsel, took every step possible to frustrate their participation. The Department of Justice took no deposition, interviewed no witness and instead confined its efforts to opposing all attempts by plaintiff's counsel to conduct appropriate discovery.

A specific instance deals with an official of the General Electric Company whom plaintiff wishes to depose. That witness refused to answer asserting the privilege against self-incrimination contained in the Fifth Amendment to the United States Constitution. In response to direct questions by the Court, counsel for the United States admitted that there was no criminal prosecution pending nor was any contemplated out of the facts in this case. Despite the lack of such proceedings the United States continues to refuse to immunize that official and thereby enable the plaintiff to proceed with discovery. This is not to suggest that the Court has determined that simply because a person has asserted a Fifth Amendment right against self-incrimation, that such is evidence of guilt. Not so. This event has been cited solely to point out the remarkable lack of cooperation given by the Department of Justice.

The Department of Justice and the General Electric Company propose to settle all claims by the payment of $234,000.00. In light of the provision in the 1986 amendments for increased penalties, a lesser burden of proof and no requirement for proof of specific intent, the Court determines from the totality of the proceeding thus far that such a settlement is inadequate. Therefore the Court rejects the Report and Recommendation of the United States Magistrate and this case is hereby returned to the trial docket.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
Chief Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 88-3171, 88-3264

JOHN MICHAEL GRAVITT, BRINGING THIS ACTION ON BEHALF OF THE UNITED STATES GOVERNMENT,
Plaintiff-Appellee,
Cross-Appellant,

v.

GENERAL ELECTRIC COMPANY,
Defendant-Appellant,
Cross-Appellee.

ORDER
(Filed May 31, 1988)

Upon consideration of the motions of the appellant and the cross-appellant for extensions of time in which to file petitions for rehearing en banc,

IT IS ORDERED that the motions be, and they hereby are, DENIED.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk